

**REMARKS**

Claims 1-17 are pending in the present application. Claims 1, 2, 5, 9, 10, 13, 14, and 17 have been amended. Applicant respectfully requests entry of the foregoing amendments to Claims 1, 2, 5, 9, 10, 13, 14, and 17 prior to further examination. No new matter has been introduced.

**Regarding Specification Objections**

The disclosure has been objected to because the dates of the priority documents are incorrect. The disclosure has been amended to correct the dates of the priority documents as well as to add corresponding U.S. Patent Nos. for issued patents.

The disclosure has been further objected to for including a reference numeral not shown in the figures. Reference numeral 10 has been removed from the specification and replaced with “(not shown)” as suggested by the Examiner.

Acceptance of the amendments to the Specification is respectfully requested.

**Regarding Section 112 Rejections**

Claims 1, 2, 4-6, 9, 10, and 12-14 have been rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 1 and 9 have been amended to distinctly claim a lost motion mechanism. Claims 2 and 10 have been amended to remove the negative limitation of “without interfering.” Claim 14 has been amended to add structure for the function, namely a warning indicator. Applicant respectfully requests the withdrawal of the rejection of amended Claims 1, 2, 5, 9, 10, 13, and 14 under 35 U.S.C. § 112. Claims 2, 4-6, 10, and 12-14 depend from allowable amended base claims 1 and 9 respectively and are allowable for the same reasons. Acceptance is respectfully requested.

Regarding Section 103 Rejections

Claim 17 has been rejected under 35 U.S.C. § 103(a) as being unpatentable over McLaughlin (U.S. Patent No. 5,645,310), Dorrell (U.S. Patent No. 5,234,249), and Renke (U.S. Patent No. 6,450,559) in view of common knowledge in the art.

The present invention provides an electro-mechanical actuator for the release of a tailgate latch mechanism to open the tailgate by remote control in combination with a module having a pre-tensioned spring linkage with some degree of lost motion which arrests the tailgate in a partially open position.

McLaughlin provides a retaining device for holding a bottom-hinged tailgate of an open-bedded vehicle in a predetermined partially open position, thereby reducing the aerodynamic drag which is created by the vertical closed tailgate. The device includes a connector of predetermined length. A first coupler attaches the connector to the vehicle, and a second coupler attaches the connector to the tailgate. The connector does not include a pre-tensioned spring and a lost motion mechanism as in now claimed in amended claim 17.

Dorrell provides an apparatus for increasing the fuel economy of motor vehicles having a cargo carrying bed with a movable tailgate panel. The apparatus adjustably positions the tailgate panel between an upstanding closed position and a horizontal loading position automatically in response to the force of wind or air pressure acting on the tailgate panel to reduce the air drag resistance on the motor vehicle. The apparatus includes a suitable biasing means, such as a mechanical spring or a conventional door closure, to adjustably position the tailgate. The apparatus does not include a lost motion mechanism as in now claimed in amended claim 17.

Renke provides a dual position endgate cable post assembly for positioning a tailgate of an automotive vehicle at any height between fully open and closed positions. The assembly includes a first cable attachment member supported by the body of an automotive vehicle, a second cable attachment member coupled to the tailgate of the automotive vehicle, and a third cable attachment member supported by the body of the vehicle, wherein the third cable attachment member is located below the first cable attachment member. The assembly does not include a pre-tensioned spring and a lost motion mechanism as in now claimed in amended claim 17.

Neither McLaughlin, Dorrell, or Renke, alone or in combination, teach, suggest, or otherwise make obvious "means for arresting the tailgate in a partially opened position, wherein the means for arresting includes a pre-tensioned spring and a lost motion mechanism." Amended independent 17 includes this limitation and are therefore allowable.

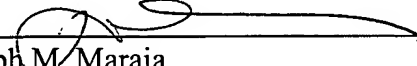
#### OBVIOUSNESS-TYPE DOUBLE PATENTING REJECTION

Claims 1, 2, 4-6, 9, 10, 12-14, and 17 have been rejected under the judicially created doctrine of obvious-type double patenting as being unpatentable over claim 12 of U.S. Patent No. 6,857,679 and claim 23 of U.S. Patent No. 6,832,801. To overcome the rejections, Applicant is filing herewith a Terminal Disclaimer in compliance with 37 CFR 1.321 (c).

#### CONCLUSION

In view of the above amendments and remarks, it is believed that all claims are in condition for allowance, and it is respectfully requested that the application be passed to issue. If the Examiner feels that a telephone conference would expedite prosecution of this case, the Examiner is invited to call the undersigned.

Respectfully submitted,  
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